No. 92-886

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

AZUL PACIFICO, INC.,
Petitioner,
vs.
CITY OF LOS ANGELES,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May petitioner separately seek a remedy directly under the Fifth Amendment of the United States Constitution in addition to the remedy provided by 42 U.S.C. § 1983?

2. Should the Court review the issue of the appropriate statute of limitations for a claim pled directly under the Fifth Amendment of the United States Constitution when there is no conflict on this issue in the courts?

3. Is an alleged regulatory taking claim ripe for review before this Court when petitioner has failed to either litigate that claim at trial or exhaust its available administrative and state judicial remedies?

PARTIES TO THE PROCEEDINGS

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In The
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October Term, 1992

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CITY OF LOS ANGELES,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent City of Los Angeles ("City") respectfully requests that this Court deny petitioner, Azul Pacifico, Inc.'s ("Azul") Petition for Writ of Certiorari seeking review of the decision of the Ninth Circuit Court of Appeal vacating the judgment below. There is a lack of subject matter jurisdiction based on the running of the statute of limitations. Further, the decision below neither conflicts with any of this Court's rulings nor conflicts with other Courts of Appeals. Therefore, this Court need not and should not grant Azul's petition. Moreover, this Court should not grant Azul's petition because Azul did not perfect, properly plead or preserve any underlying claims upon which relief could be granted.

OPINIONS AND ORDERS BELOW

On July 23, 1992, the Ninth Circuit Court of Appeals issued its Order granting rehearing. That Order resulted in the opinion of the Ninth Circuit dated November 1, 1991, being withdrawn and the district court judgment vacated. The July 23, 1992, Order is reported at 973 F.2d 704. See Petitioner's Appendix ("Pet. App.") B, 25a-27a. The November 1, 1991, opinion of the Ninth Circuit is reported at 948 F.2d 575. Pet. App. A, 1a-24a.

On May 31, 1990, the district court filed its Opinion after trial in this matter, which opinion is reported at 740 F.Supp 772. Pet. App. C., 28a-46a.

JURISDICTION

Jurisdiction in the district court was based upon 28 U.S.C. §§ 1331 and 1343(3). Jurisdiction in the Ninth Circuit Court of Appeals rested upon 28 U.S.C. § 1291. Jurisdiction before this Court is based upon 28 U.S.C. § 1254(1). Respondent received the Petition for Writ of Certiorari on November 23, 1992, and is timely filing this Brief in Opposition to the Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent agrees in substantial part with the statement made by petitioner in this regard, with the exception that the case also involves § 151.00, *et seq.* of the Los Angeles Rent Stabilization Ordinance, a portion of which, § 151.01, is set out verbatim in Respondent's Appendix ("Resp. App.") B attached herein.

STATEMENT OF THE CASE

A. Statement of Facts

Azul is the owner of the Tahitian Terrace Mobile Home Park ("Park"), located in the City of Los Angeles. The residents include senior citizens, many of whom are on fixed incomes. As the landlord of the Park, Azul rents mobilehome sites to its residents, who own the individual homes located in the Park. Despite their misnomer, mobilehomes are not truly mobile, and "in general mobile home tenants tend to remain in the park for many years and are a quite stable population of renters." Pet. App. C., 30a. This is because mobilehomes are expensive to move, and the few available parks to which to move them have very few spaces available. Pet. App. C., 30a. As a result, most coaches remain in mobilehome parks, and persons interested in living in a particular park must purchase a coach in the park to do so.

Like in most California cities, there is a housing shortage in Los Angeles, including a shortage of mobilehome rental space. Pet. App. C., 30a. This shortage of rental space, combined with the relative immobility of coaches, has "historically led to abuses of mobile home park tenants by landlords." Pet. App. C., 30a. These abuses have included charging exorbitant rents and evicting tenants without cause, forcing "a tenant to sell her mobile home to the owner at a fraction of its worth" because there was no available space for the tenant to move the home. Pet. App. C., 31a.

In 1978, California enacted a Mobilehome Residency Law designed, in part, to curb some of these abuses. That law includes protections for mobilehome residents against the termination of a tenancy without cause, Cal.

Civ. Code §§ 798.55 and 798.56, and the forcible removal of a coach from the park upon a sale. Cal. Civ. Code § 798.73. State law also provides that a landlord cannot refuse to accept a new purchaser of a coach as a tenant, except under limited circumstances generally related to that person's ability to pay rent and willingness to follow park rules. Cal. Civ. Code § 798.74. Pet. App. F, 60a-64a.

In 1978, the City of Los Angeles adopted § 151.00, *et seq.* of the Los Angeles Municipal Code, known as the Rent Stabilization Ordinance ("RSO"), which became operative on May 1, 1979. Its purpose was to "regulate rents so as to safeguard tenants from excessive rent increases while at the same time providing landlords with just and reasonable returns from their rental units." Resp. App. B-2.

Generally under the RSO, when a tenant voluntarily vacates a rental or is evicted under certain specified grounds, the landlord may re-rent the rental unit for any amount, after which it becomes subject to the provisions of the RSO. However, because "mobile home rent control differs significantly from rent regulation of apartments due to the nature of a mobile home as a significant financial investment for the mobile home park tenant," the RSO was amended in 1982 to add Subsection C 5 to § 151.06 of the Los Angeles Municipal Code. This provision prohibited park operators from raising rents upon the sale of a mobilehome coach. Pet. App. C., 45a. The RSO was amended again in 1984, repealing Subsection C 5 of § 151.06 and replacing it with Subsection F, which allows park owners to increase rents by 10% upon sale of the mobilehome coach. The constitutionality of the provisions of the RSO as applied to mobilehome parks, including its limitation of rent increases has been upheld by the California courts in *Palos Verdes Shores*

Mobile Estates, Ltd. v. City of Los Angeles, 142 Cal.App.3d 362, 190 Cal.Rptr. 866 (1983).

B. Procedural History

Azul filed its complaint on April 10, 1987, five years after the 1982 amendment to the RSO prohibiting any rent increases upon coach sales, and three years after the 1984 amendment authorized a rent increase up to 10% upon a coach sale. Azul's only complaint about the RSO was that there were limits on how much it could raise the rent upon the sale of the tenant's coach. It objected to the 10% limit and wanted to be able to increase rents to any amount. It wanted to do so irrespective of the impact that excessive rents might have upon the ability of existing tenants to sell their homes. However, Azul was faced with the decision in *Palos Verdes Shores* upholding the constitutionality of the RSO against due process and equal protection challenges.

Basing its complaint on the Ninth Circuit decision in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert. den*, 485 U.S. 940 (1988), Azul filed in the federal district court and claimed that the RSO, in conjunction with the California Mobilehome Residency Law, constituted a physical taking of its property. Azul alleged that:

> "The Rent Control Law has had the effect of depriving the Plaintiff of all use and occupancy of its real property and granting to the tenants of mobile homes presently in the Park, as well as the successors in interest of such tenants, the right to physically permanently occupy and use the real property of Plaintiff." Resp. App. A-2.

It contended that "the operation and enforcement of the Rent Control Law effects a taking of Plaintiff's property for public use and benefit without payment of just compensation" and "constitutes a taking of property in violation of the Fifth and Fourteenth Amendments to the United States Constitution and a deprivation of civil rights under color of law in violation of 42 U.S.C. §§ 1981 and 1983." [1] Resp. App. A-3.

Azul never alleged a *regulatory taking*. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). It did not allege that the RSO deprived it of all economic use under the standards enunciated in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), or that it failed to "substantially advance a legitimate state interest" under *Nollan v. California Coastal Comm'n.*, 483 U.S. 825 (1987).

At trial, Azul relied exclusively on its claim of permanent physical occupation. It presented evidence solely to support its allegation that the RSO constituted a *physical* taking of property to prove: "(1) that the effect of the Los Angeles Rent Stabilization Ordinance has been and is to deprive Plaintiff of an interest in its land and transfer that interest to Plaintiff's tenants; (2) that Plaintiff's tenants are thereafter able to sell that transferred interest for value, (3) that Plaintiff's tenants do sell that transferred interest for value, (4) that Plaintiff's tenants' sales of such transferred interests occur in an established market, and (5) that Plaintiff's tenants have and do receive windfalls upon the sales of coaches." Plaintiff's Trial Brief at 2.

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[1] Azul's Section 1981 claim was dismissed upon the City's motion to dismiss. Pet. App. D, 55a-56a.

After a three-week court trial, the district court, acknowledging that "[t]he parties agree that this case is controlled by the Ninth Circuit decision in *Hall* . . .," not surprisingly found that the RSO amounted to an unconstitutional *physical* taking.[2] Pet. App. C., 32a. While acknowledging under the three-tier *Hall* test that the provision of the RSO *does* advance a legitimate state interest, the district court believed itself compelled under *Hall* to find that it constituted a physical taking.[3] In fact, the court noted that "the plaintiff does not argue that there was no legitimate state interest in enacting the Rent Stabilization Ordinance, *including the vacancy control provisions*." (Emphasis added.) Pet. App. C., 43a. The district court went to great lengths to explain that under this Court's standard in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), ordinances which regulate landlord and tenant relationships are a valid exercise of the state's police power. Thus, the court found that where the City's goal through "vacancy control" was to "protect the substantial investments of tenants in a distorted market where demand far exceeds supply, the ordinance advances a legitimate governmental objective." Pet. App. C., 44a. Nonetheless, applying *Hall* to the facts before it, the district court felt constrained to invalidate the vacancy control provision. Pet. App. C., 46a. Accordingly, it issued an injunction against the

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[2] *Hall*, which of course has since been overruled by this Court in *Yee v. City of Escondido*, 112 S.Ct. 1522 (1992), was considered a takings case based on a physical takings theory akin to *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), as distinct from a regulatory taking akin to *Penn Central*.

[3] *Hall* provided a three-part test to evaluate a physical takings allegation: 1) does the governmental action constitute a physical taking; 2) does the action advance a legitimate governmental interest; and 3) has just compensation been paid? 833 F.2d at 1274.

City's enforcement of the provision and imposed damages in the amount of $1,002,240.

Addressing the City's statute of limitations argument raised in a summary judgment motion and renewed at trial, the court found that the ordinance worked a "continuing wrong" which occurred each time a mobilehome coach was sold, and thus tolled the statute of limitations as to the cause of action. It acknowledged that the principles of *Wilson v. Garcia*, 471 U.S. 261 (1985) were applicable here to determine the limitations period, but applied *Wilson* to limit recovery of damages, rather than applying it to bar the action. Thus, the district court applied California's personal injury statute of limitations of one year, citing *Usher v. City of Los Angeles*, 828 F.2d 556 (9th Cir. 1987), to limit the recovery of damages to one year prior to the filing of the lawsuit. (The district court drew no distinction between a "direct" cause of action filed under the Fifth Amendment, as opposed to a § 1983 claim, but spoke broadly about the application of the statute of limitations to the case in general.)

The City appealed the judgment. Azul appealed the district court's denial of its application of costs for expert witness fees. It did not appeal the court's ruling that the challenged RSO provision substantially advances a legitimate governmental interest.

On November 1, 1991, the Court of Appeals affirmed the decision below *in part*. In an opinion authored by Judge Alex Kozinski, who also authored *Hall*, the court reasoned that the vacancy control provision worked a physical taking under *Hall*. Pet. App. A, 11a. It also agreed with the district court that the ordinance furthered a legitimate governmental interest. Pet. App. A, 14a. It recognized that the vacancy control provision serves the same governmental purpose as the RSO: protecting

incumbent tenants "from being forced to sell the coaches at distress-sale prices in the event landlords were to set rents for new tenants so high that no one would want to buy the coach." The court held that "there is a sufficient nexus between the challenged provision and a legitimate justification." Pet. App. A, 14a.

Unlike the district court, however, the Ninth Circuit found that the "continuing wrong" theory was inapplicable to the facts in *Azul* and correctly determined that the cause of action accrued when the challenged ordinance was enacted. Pet. App. C., 19a. It held that the § 1983 action was barred by the statute of limitations by application of the rule of *Wilson v. Garcia*, 471 U.S. 261 (1985).

However, without the benefit of prior briefing on the issue, the court also determined that Azul had pled a "direct" cause of action under the Constitution which was governed by a wholly different statute of limitations.[4]

On November 15, 1991, the City filed its petition for rehearing. Azul filed its response. Both briefs constituted the first time the issue of the availability of a "direct" cause of action under the facts presented here was extensively briefed by the parties.

On July 23, 1992, the Ninth Circuit issued its Order granting the City's petition and withdrawing its earlier opinion.[5] Citing established precedent both in the Ninth Circuit and other circuits across the nation, the Court of Appeal determined that Azul's complaint was indeed

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[4] It also invalidated the injunction as being an inconsistent remedy under the just compensation provision of the Constitution and remanded the case for a different calculation of damages.

[5] In the interim, this Court decided *Yee v. City of Escondido*, 112 S.Ct. 1522 (1992), which overruled *Hall*.

barred by the statute of limitations. It determined that there is no cause of action directly under the Constitution in this instance since Azul had an available remedy under § 1983. Since the cause of action accrued when the challenged ordinance was adopted, *DeAnza Properties X Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1085 (9th Cir. 1991), Azul should have filed its complaint "within three years of the May 1982 date of enactment or within one year of the Supreme Court's decision in *Wilson v. Garcia*, 471 U.S. 261 (1985)." Pet. App. B., 26a. Thus, the district court's judgment was vacated because of the lack of subject matter jurisdiction. This decision was not in error.

REASONS WHY THE WRIT SHOULD BE DENIED

A. There Is No Conflict In The Courts As To Whether There Is A Separate Direct Cause Of Action Under The Constitution When There Is An Available Remedy Under Section 1983.

Petitioner apparently contends that this Court should grant its petition because the decision below conflicts with a "series of decisions by this Court," Pet. at 13, as well as decisions from other circuits. However, the Ninth Circuit decision was based on existing precedent from this Court as well as decisions from its own and other circuits. No real or direct conflict exists. Accordingly, no issue has been presented requiring a decision by this Court.

While the Fifth Amendment is "self-executing" in the sense that the *remedy* of just compensation is grounded in the Constitution, it does not follow that a separate direct cause of action exists in addition to an available *statutory* remedy.

This Court and others have said that a direct cause of action is *not* available if a plaintiff has a statutory remedy to redress constitutional wrongs. *Davis v. Passman*, 441 U.S. 228 (1979); *Ward v. Caulk*, 650 F.2d 1144 (9th Cir. 1981).

In *Davis v. Passman, supra*, 441 U.S. 228, the Court held that an action involving a sex discrimination claim by a Congressional employee against a Congressman could be filed directly under the Fifth Amendment but *only because the plaintiff did not otherwise have a statutory remedy available to her*, stating that litigants alleging constitutional deprivations "and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." 442 U.S. at 242.

In *Jacobs v. United States*, 290 U.S. 13 (1933), the Court established that "statutory recognition [is] not necessary," to bring a suit for just compensation. The question here is what remedy is appropriate when there *is* a statutory remedy available, namely § 1983, to redress *all* forms of constitutional violations as torts, including takings of property without just compensation.

In *Davis*, the Court relied on its reasoning in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), where the Court allowed a direct cause of action under the Constitution because, otherwise, plaintiffs would have been left with *no* remedy to redress violations of the Constitution.

Later, in *Carlson v. Green*, 446 U.S. 14 (1980), the Court stated:

> ". . . a [Bivens] cause of action may be defeated in a particular case, however, in two situations. The first is when defendants demonstrate 'special factors counselling hesitation in the absence of affirmative action by Congress' . . . [citations omitted] . . . The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." 446 U.S. at 18.

In *Carlson*, this Court viewed § 1983 actions as serving the same purpose as *Bivens* by providing a statutorily adequate remedy to redress constitutional wrongs, and considered it an "equally effective" remedy as *Bivens*. Thus, "complimentary" relief under *both Bivens*, (*i.e.*, a "direct" cause of action under the Constitution) and a statutory remedy is not necessary where the statutory remedy is effective.[6]

Following the Court's lead in these cases, the Ninth Circuit judgment below relied on established precedent, overlooked in its initial November 1, 1991 opinion, but cited in support of its July 23, 1992 opinion. For example, *Ward v. Caulk*, 650 F.2d 1144 (9th Cir. 1981) looked to the Court's decision in *Carlson v. Green*,

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[6] In *Carlson*, the Court determined that the statutory remedy involved there, the Federal Tort Claims Act (FTCA), was *not* as effective as a *Bivens* remedy and allowed the *Bivens* suit, even though plaintiff's allegations could also support a suit under the FTCA.

supra, 446 U.S. 14, in holding that the plaintiff there did not have a separate cause of action under the Constitution because it had a remedy under § 1983. In *Bretz v. Kellman*, 722 F.2d 503 (9th Cir. 1983), the court followed the precedent established in *Ward v. Caulk* and, applying the *Bivens* rationale, came to the same conclusion.

As the Ninth Circuit noted, other circuits are in accord, citing *Thomas v. Shipka*, 818 F.2d 496 (6th Cir. 1987); *Hunt v. Robeson County Dept. of Social Serv.*, 816 F.2d 150 (4th Cir. 1987); *Morrison v. Metropolitan Area Transit,* 702 F.2d 1037 (D.C. Cir. 1983); and *Bieneman v. City of Chicago,* 662 F. Supp. 1297 (N.D. Ill 1987), *appeal dismissed*, 838 F.2d 962 (7th Cir. 1988).[7]

Azul contends that this Court's enunciation of the "self-executing" nature of the just compensation clause discussed in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), allows for essentially dual relief for a single federal violation based upon a single set of facts. In *First English*, the Court noted that this principle of the "self-executing" character of the just compensation clause has been established since *Jacobs v. United States*, 290 U.S. 13 (1933). There, the Court acknowledged that the right to compensation is grounded in the Constitution itself and guaranteed by the Constitution. Of course, since the Court enunciated those principles in *Jacobs*, this Court has ruled that § 1983 actions may be filed against local

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[7] While the Seventh Circuit in *Bieneman v. City of Chicago*, 864 F.2d 463 (7th Cir. 1988) rejected the district court's conclusion about the availability of a direct cause of action, the court determined nonetheless that the same statute of limitations applicable to a 1983 claim applied under *Wilson* to a direct cause of action under the Constitution.

governments and municipal corporations, providing a remedy which was previously unavailable. *Monell v. New York City Dept. of Social Serv.*, 436 U.S. 658 (1978).

Contrary to petitioner's assertion, the Ninth Circuit correctly applied the reasoning of the Supreme Court, and its decision is not in conflict with *First English* or other decisions of this Court.

Neither is there a "real and embarrassing conflict of opinion and authority between the Courts of Appeals." *N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502-503 (1950).

The only circuit that Azul cites that is in conflict with the other circuits on the issue of the availability of a direct cause of action irrespective of available statutory remedies is the Seventh Circuit, as reflected by the *Bieneman* case.[8] Yet the result in *Bieneman*, as here, is the same regardless of whether this court finds a direct cause of action. In *Bieneman*, the court held that even if there is a direct cause of action under the Constitution, the statute of limitations applicable to a § 1983 claim under *Wilson* should be applied.

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[8] The City is not unmindful of petitioner's citation to *Ocean Acres Limited Partnership v. Dare County Board of Health*, 707 F.2d 103 (4th Cir. 1983), to suggest that a conflict on this issue also exists in the Fourth Circuit. Yet, in light of *Hunt v. Robeson County Dept. of Social Serv.*, 816 F.2d 150 (4th Cir. 1987), albeit in a nontakings context, where the court limited plaintiff to his remedy under § 1983, *Ocean Acres* is now of limited utility. Similarly, the holding in *Kostka v. Hogg*, 560 F.2d 37 (1st Cir. 1977) does not squarely present a conflict on these issues requiring this Court's intervention. In that case and in *Molina v. Richardson*, 578 F.2d 846 (9th Cir. 1978), the courts, in dicta, posed but did not answer questions whether takings cases are somehow different from other protected rights under the Constitution. *Wilson*, however, treats all violations of the Constitution as torts, including "damages to property."

Thus, even if the Seventh Circuit, being the only circuit at odds with the Second, Fourth, Sixth, Eight and Ninth on this issue, is correct, the application of that court's thinking would still result in the federal court being deprived of its subject matter jurisdiction here. *Bieneman* thus hardly presents a reason to grant the writ, and for prudential reasons alone, the petition should be denied.

B. There Is No Conflict In The Courts As To The Appropriate Statute of Limitations To Apply To A Cause of Action Seeking Relief Directly Under The United States Constitution.

Contrary to Azul's assertion, there is no conflict among the courts as to what the appropriate statute of limitations is for a constitutional tort. Both the Ninth Circuit (*Azul* and *DeAnza*) and the Eight Circuit (*Bieneman*) have said that § 1983 statute of limitations rules would apply to a direct cause of action. No court in the post-*Wilson* era has concluded differently.

Thus, the law is clear concerning the statute of limitations that applies to all constitutional violations and needs no further clarification.[9] *See Wilson v. Garcia*,

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[9] Despite petitioner's assertion to the contrary, "unclarity in the law" played no part in the Ninth Circuit's recent decision in *McDougal v. County of Imperial*, 942 F.2d 668 (9th Cir. 1991), to "defer consideration of the appropriate statute of limitations for the surviving inverse condemnation claim." Pet. Brief at 22. Rather, the court stated that it would "not consider whether this claim is also barred by the one-year statute of limitations, Cf. *DeAnza Properties X Ltd., v. County of Santa Cruz*, 936 F.2d 1084, 1085 (9th Cir. 1991), as the issue has not been properly raised on appeal. It may, of course, be addressed on remand." 942 F.2d 668, 675 n.5. In any

(continued)

471 U.S. 261 (1985); *Usher v. Los Angeles*, 828 F.2d 556 (1987).

Constitutional violations are torts, and this Court in *Wilson* determined that state law governs the *length* of the limitations period and that a standard "broad characterization" of all § 1983 claims best fits the statute's remedial interests and furthers the "federal interest in uniformity." 471 U.S. at 270.

This Court concluded that all constitutional wrongs should indeed be characterized in the same way and acknowledged that "injuries to property" fall within the panoply of "potential tort analogies." 471 U.S. at 277. Thus, *Wilson* resolved any conflicts that may have existed.

Adopting the Court's reasoning in *Wilson*, the Eighth Circuit in *Bieneman* reasoned that any "direct" cause of action under the Constitution's Fifth Amendment takings clause should also be filed within the time allowed for a § 1983 suit based upon the same federal right.

Wilson teaches that the nature of the claim, whether it is filed "directly" under the Fifth Amendment or asserted under § 1983 based upon the Fifth Amendment, is the same. In either case, the claim lies in *tort*.

Accordingly, the *Bieneman* court applied the same statute of limitations for takings cases filed directly under the Constitution as those filed under § 1983. It stated:

> "There is no reason to have a different period of limitations, and a strong reason not to: any difference would give the plaintiff an incentive to pick

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(fn. continued)
event, conflict within a circuit should first be resolved intra-circuit before review to this Court is sought.

> whichever jurisdiction provided the longer period, recreating the uncertainty that the Supreme Court sought to eliminate. We conclude, therefore, that there should be a single period of limitations for all suits in which the Constitution supplies the remedy." 864 F.2d at 469.

Azul relies primarily on the Fourth Circuit case of *Ocean Acres Limited Partnership v. Dare County Board of Health*, 707 F.2d 103 (4th Cir. 1983) (a pre-*Wilson* case) as purportedly in conflict with the Ninth Circuit (as well as the Eighth Circuit, based on *Bieneman*). However, *Ocean Acres* applied pre-*Wilson* rules. Since *Wilson*, cases out of the Fourth Circuit now follow the Eighth Circuit's approach and apply the state's personal injury limitations based upon *Wilson* even to "direct takings" claims. *See Jackson v. City Council of Charlottesville, VA*, 659 F. Supp. 470 (W.D. VA 1987), *aff'd in part*, 840 F.2d 10 (4th Cir. 1988). Any conflict posed by *Ocean Acres* has now been re-evaluated by that circuit in light of this Court's *Wilson* decision.

Since any conflict that may once have existed has been resolved by *Wilson, Davis* and *Carlson*, this Court need not review this case to reiterate its position on this issue. Thus, petitioner seeks this Court's review only to obtain a longer statute of limitations to present its claims. At stake, however, is only Azul's interest to raise rents beyond the ordinance's limitations, despite its acknowledgment that the park operates profitably even under "vacancy control." Trial transcript, Vol. 1 at 154:4-6.

C. There Is No Conflict In The Courts As To When A Takings Claim Accrues For The Purpose of The Statute of Limitations Or Otherwise.

When a federal claim accrues is a question of federal law. *Venegas v. Wagner*, 704 F.2d 1144, 1145 (9th Cir. 1983). Courts of various circuits have all concurred that the statute of limitations begins to run when a plaintiff "knows or has reason to know of the injury which forms the basis for the action." *Peter Henderson Oil Co. v. City of Port Arthur, Tex.*, 806 F.2d 1273, 1275 (5th Cir. 1987). *See also Norco Constr. Inc. v. King County*, 801 F.2d 1143, 1145 (9th Cir. 1986), citing to *Trotter v. International Longshoremen's & Warehousemen's Union*, 704 F.2d 1141, 1143 (9th Cir. 1983); *Jackson v. City Council of Charlottesville, VA*, 659 F. Supp. 470, 474 (W.D. VA 1987), citing to *Bireline v. Seagondollar*, 567 F.2d 260, 263 (4th Cir. 1977); *Sevier v. Turner*, 742 F.2d 262 (6th Cir. 1984).

When that "knowledge of injury occurs" is, of course, a factual question dependant upon the peculiarity of each case.

Federal courts have determined in certain cases that a cause of action challenging an ordinance accrues on the date the ordinance is adopted. *Peter Henderson Oil Co., supra*. Here, evaluating a *Hall* physical takings claim, the Ninth Circuit relied on *DeAnza Properties X Ltd. v. County of Santa Cruz*, 936 F.2d 1084 (9th Cir. 1991), and determined that the claim accrued upon the passage of the challenged provision of the RSO.

Azul cites to no authority contradicting these decisions. Instead, Azul suggests that cases applying a "continuing wrong" doctrine should be applied. Yet the "continuing wrong" doctrine does not supply the Court

with a methodology to determine *when* a cause of action *accrues*; rather, it *tolls* the running of the statute of limitations under circumstances where it is shown, and a factual determination is made, that the *prohibited activity* is a continuing one. *See e.g. United States v. Dickinson*, 331 U.S. 750, 751 (1947); *Jackson v. City Council of Charlottesville, VA*, 659 F. Supp. 470, 474 (W.D. VA 1987); (*Cf. Ward v. Caulk*, 650 F.2d 1144, 1147, acknowledging the existence of the doctrine but rejecting the "continuing wrong" doctrine under the facts there because "a continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation.")

That different courts have applied the "continuing wrong" doctrine to the particular factual settings before them does not illustrate an analytical conflict between the courts at all but merely evidences conflicting results based on an "ad hoc, factual inquiry" into each case to determine what principles to apply. *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 295 (1981).

In contrast to cases involving the continual filling of a dam with water (*Dickinson*), or a "continuous chain of events" (*Barbaccia v. County of Santa Clara*, 451 F. Supp. 260 (1978)), or "continual unlawful acts" (*Ward*), the Ninth Circuit correctly determined that this theory was inapplicable to the facts here. The enactment of the challenged RSO provision occurred at one time.

Thus, based on the allegations in the complaint about the invalidity of the ordinance, the Ninth Circuit correctly found that the taking occurred when the ordinance was adopted. Since no real analytical conflict is presented on this issue, it is not appropriate for this Court's review. *Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974).

D. Petitioner's Regulatory Taking Claim Is Not Properly Before This Court Because It Was Not Litigated Below.

It is a general rule of this Court that it will not decide federal constitutional issues raised for the first time in this Court and not fully considered by the Court of Appeals. *Carlson v. Green*, 446 U.S. 14 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970). We recognize that based on *Carlson* as well as *Yee v. City of Escondido*, 112 S.Ct. 1522, 1531 (1992), with respect to cases arising from the federal courts the rule is prudential and does not deprive the Court of jurisdiction. Yet, for prudential reasons, the Court should not consider the question here.[10]

Unlike *Yee* (a pleading case) where "it is *unclear* whether petitioners made [the regulatory taking] argument below" or plead the requisite facts in its complaint, 112 S.Ct. at 1532 (emphasis added), the record here is unambiguous in this regard. Azul never alleged that the ordinance did not "substantially advance a legitimate state interest." *See Nollan v. California Coastal Comm'n.*, 483 U.S. 825 (1987). Nor did Azul allege that it was deprived of any economic use of its property under the test of *Agins v. City of Tiburon*, 447 U.S. 255 (1980). Resp. App. A1-A5.

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[10] Even if this Court were to find that the Ninth Circuit was wrong in holding that the statute of limitations barred the action, any review by this Court of a regulatory taking claim would be inappropriate.

Instead, Azul alleged that the ordinance caused a physical occupation of its property as the basis of its taking claim. Consequently, at trial Azul presented evidence to support its physical occupation theory. Not surprisingly, the district court found:

> "In this case, the plaintiff does not argue that there was no legitimate state interest in enacting the Rent Stabilization Ordinance, including the vacancy control provisions." Pet. App. C., 43a.[11]

Since petitioner did not argue or present evidence relating to a regulatory taking at the trial below, and since neither the trial court nor the Ninth Circuit "squarely" addressed or made any ruling on this issue, *Yee*, 112 S.Ct. at 1534, this issue is not properly preserved for this Court's review.

Azul's petition for review relies heavily on the withdrawn Ninth Circuit opinion and the vacated district court judgment. It claims that it was error on the part of both courts to find that the City's ordinance substantially advanced a legitimate state interest and seeks this Court's review of that issue. Petitioner, however, is precluded from seeking review of both those decisions, now vacated and withdrawn, because of its failure to file a cross-appeal of *either* decision.

The Court has previously held that a party who has earlier failed to cross-appeal in a *lower* appellate court cannot on an appeal from the lower court attack the

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[11] The district court held that the vacancy control provision advanced a legitimate governmental interest. It did so because that issue was one of the elements to consider as part of *Hall*'s "three-part analysis." Pet. App. C., 33a. It never decided whether the vacancy control provision resulted in a *regulatory* taking.

judgment which was at issue in the earlier appeal for purposes of obtaining a modification in his favor. *Penfield Co. v. Securties & Exchan. Comm.* 330 U.S. 585 (1947). That is what Azul seeks to do here. In its cross-appeal, Azul chose not to appeal the decisions below that hold that the RSO substantially advances a legitimate governmental interest. It instead chose to limit its issue on cross-appeal to the availability of expert witness fees. See U.S. Court of Appeals Docket No. 90-56066, Appellee's Brief.

Azul should thus be barred from now attacking the portion of the judgment below that it disagrees with, when it did not seek review of that portion by way of cross-appeal. *Letulle v. Scofield*, 308 U.S. 415 (1940), *reh. den.*, 309 U.S. 694 (1940).

E. Petitioner's Regulatory Taking Claim Is Not Ripe For Review In This Court Because Petitioner Has Not Exhausted Administrative Remedies Nor Sought And Been Denied Just Compensation In State Court.

For this Court to review petitioner's newly-fashioned regulatory takings claim, this Court would have to find that the Ninth Circuit erred in its ruling on the statute of limitations, would have to overlook the fact that neither the district court nor the Court of Appeals reviewed a regulatory takings claim, and overlook the fact that Azul never sought a final administrative determination of the application of the ordinance to it and never first presented its claims in state court. This Court has ruled that under these circumstances, no federal court should

review a claim such as this unless remedies have first been exhausted.

This Court established under a two-tier analysis in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), that a regulatory takings claim is not ripe for review in federal court unless the plaintiff has obtained a final administrative determination of the application of the ordinance to it and first requested and been denied just compensation in state court. Azul has done neither.

The district court excused Azul from meeting the *Williamson* test because petitioner's physical occupation theory of liability did not require an exhaustion of administrative remedies. *Hall, supra*, 833 F.2d at 1282 n.28. However, that same reasoning cannot be applied to Azul's newly fashioned regulatory takings claim. Rather, Azul was required to obtain a final decision from the City on the ordinance's application to its property *and* seek compensation through the state courts, as required by *Williamson*.[12]

This Court has already analyzed the "*Yee* factors" and concluded they do not give rise to a *physical* taking. In essence, petitioner is seeking review of the Ninth Circuit's original decision by refashioning the *Yee* physical taking factors and giving them another name.

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[12] Azul might argue that when it filed its complaint, prior to *First English*, California did not recognize the remedy of damages for a regulatory taking, and that it had no adequate remedy at that time. The lack of damages as a remedy did not excuse Azul from seeking compensation in state court as required by *Williamson*. Nothing prevented Azul from presenting its claim in state court, as the landowner in *First English* did, and then proceeding to federal court, as the landowner did there.

Petitioner now suggests that the "*Yee* factors" should be considered as the standard for analyzing *regulatory* takings. Petitioner seeks to have the Court depart from the standards established by *Agins* and *Nollan*. To date, nothing stated by this Court or lower courts suggests the appropriateness of such a novel approach. Moreover, there is no conflict among the circuits on this issue.[13] Therefore, no issue has been framed which justifies review by this Court. As this Court observed in *Yee*:

> "... were we to address the [regulatory taking] issue here, we would apparently be the first court in the nation to determine whether an ordinance like this one effects a regulatory taking." 112 S.Ct. at 1534.

This Court, therefore, should "leave the regulatory taking issue for the California Courts to address in the first instance." *Id.* at 1534.

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[13] To the extent *Sandpiper Mobile Village v. City of Carpinteria* No. B058435, 1992 Cal.App. LEXIS 1228 (Cal. Ct. App., Oct. 15, 1992) and *Colony Cove Association v. The City of Carson* No. B062956 (Cal. Ct. App., Oct. 22, 1992), may represent such a conflict, the California Supreme Court should have the first opportunity to resolve it.

CONCLUSION

Based on the foregoing, the City of Los Angeles respectfully submits that the decision of the Ninth Circuit Court of Appeal was proper, and Azul's petition should be denied.

DATED: December 21, 1992.

Respectfully submitted,

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APPENDIX A

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AZUL PACIFICO, INC.,
a California corporation,
Plaintiff,
vs.
CITY OF LOS ANGELES,
a Municipal corporation,
Defendant.

Case No. 87 02287

COMPLAINT FOR DECLARATORY RELIEF, INJUNCTION, DAMAGES FOR VIOLATION OF CIVIL RIGHTS

A JURY TRIAL IS DEMANDED

PLAINTIFF AZUL PACIFICO, INC., a California corporation, hereby alleges:

JURISDICTION

1. The Court has jurisdiction under 28 U.S.C. 1331(a) and 1343(3) in that the claim arises under the First and Fourteenth Amendments to the Constitution of the United States, and under 42 U.S.C. §§1981, 1983

and 1988 as more fully appears herein. This is a civil action where the matter in controversy exceeds in sum of $10,000.00 exclusive of interest and costs.

PARTIES

2. Plaintiff AZUL PACIFICO, INC. is a corporation duly organized and in good standing under the laws of the State of California.

3. Defendant CITY OF LOS ANGELES is a municipal corporation located in the County of Los Angeles, State of California.

4. Plaintiff is the owner of the Tahitian Terrace Mobile Home Park (the "Park") within the City of Los Angeles. The Park contains 158 spaces rented for occupancy by mobile homes used by the owner of such mobile homes for residential purposes.

FIRST CLAIM

5. On or about April 21, 1979, the City of Los Angeles adopted Ordinance No. 152,120 and amended said Ordinance on September 1, 1980 by adoption of Ordinance No. 154,237, (such Ordinances, as amended, being referred to herein as the "Rent Control Law"). The City of Los Angeles, through its agents, employees and personnel, is enforcing the provisions of the Rent Control Law.

6. The Rent Control Law has had the effect of depriving the Plaintiff of all use and occupancy of its real property and granting to the tenants of mobile homes presently in the Park, as well as the successors in interest of such tenants, the right to physically permanently occupy and use the real property of Plaintiff. Plaintiff has no legal right to receive any compensation for the

rights now enjoyed by the tenants of the Park other than the stream of income from rents as regulated by the Rent Control Law.

7. The tenants of the Park have the power and ability, and have used that power and ability on many occasions, to sell the rights of use and occupancy of Plaintiff's real property, which have been transferred to said tenants by operation and enforcement of the Rent Control Law, to other parties without the consent of Plaintiff and to receive consideration from such other parties for the transfer of such rights.

8. The consideration for which the tenants of the Park can, and do, transfer the ownership of individual coaches is substantially in excess of the value of those coaches and the excess consideration over the value of the coaches is due to the rights of permanent physical occupation at a fixed rent which have been transferred to the tenants of the Park by the operation and enforcement of the Rent Control Law.

9. The tenants of the Park have no obligation to account to Plaintiff for the proceeds of the sale of the rights which have been transferred to the tenants of the Park by the operation and enforcement of the Rent Control Law.

10. The operation and enforcement of the Rent Control Law effects a taking of Plaintiff's property for public use and benefit without payment of just compensation. The enforcement of the Rent Control Law by the City of Los Angeles constitutes a taking of property by said defendant for private purpose in violation of the Fifth and Fourteenth Amendments to the United States Constitution and a deprivation of civil rights under color of law in violation of 42 U.S.C. §§1981 and 1983.

11. As a direct and proximate result of the operation and enforcement of the Rent Control Law by Defendant, Plaintiff has suffered damages in the amount of $15,000,000.00.

SECOND CLAIM

12. Plaintiff incorporates herein by reference all of the allegations contained in Paragraphs 1 through 11 hereof as though fully set forth.

13. The Rent Control Law is constitutionally infirm in that no emergency exists which justifies its imposition on plaintiff, and, therefore, continued enforcement thereof violates the Fifth and Fourteenth Amendments to the United States Constitution as well as 42 U.S.C. §§1981 and 1983.

WHEREFORE, plaintiff prays against defendant as follows:

1. For damages in the amount of $15,000,000.00

2. For declaration that the Rent Control Law is unconstitutional, invalid and unenforceable and that none of the parties hereto have any right, duty or obligation to comply with the terms or provisions thereof;

3. For a permanent injunction enjoining defendant, its agents, employees and all those acting by, through, for, on behalf, or in concert with defendant, or pursuant to any of the provisions of the ordinance, from authorizing or engaging in, directly or indirectly, the enforcement of the ordinance;

4. For costs of suit;

5. For attorneys' fees as provided by 42 U.S.C. §1988; and

6. For such other and further relief as the court deems proper.

Dated: April 9, 1987.

SHERMAN L. STACEY
JONATHAN S. HORNE

By /s/ Sherman L. Stacey
Sherman L. Stacey
Attorney for Plaintiff

A JURY TRIAL IS DEMANDED.

SHERMAN L. STACEY
JONATHAN S. HORNE

By /s/ Sherman L. Stacey
Sherman L. Stacey
Attorney for Plaintiff

APPENDIX B

SEC. 151.01. DECLARATION OF PURPOSE.

There is a shortage of decent, safe and sanitary housing in the City of Los Angeles resulting in a critically low vacancy factor.

Tenants displaced as a result of their inability to pay increased rents must relocate but as a result of such housing shortage are unable to find decent, safe and sanitary housing at affordable rent levels. Aware of the difficulty in finding decent housing, some tenants attempt to pay requested rent increases, but as a consequence must expend less on other necessities of life. This situation has had a detrimental effect on substantial numbers of renters in the City, especially creating hardships on senior citizens, persons on fixed incomes and low and moderate income households. This problem reached crisis level in the summer of 1978 following the passage of Proposition 13.

At that time, the Council of the City of Los Angeles conducted hearings and caused studies to be made on the feasibility and desirability of various measures designed to address the problems created by the housing shortage.

In August, 1978, pending development and adoption of measures designed to alleviate the City's housing crisis, Council adopted Ordinance No. 151,415 which temporarily rolled back recently imposed rent increases, and prohibited most rent increases on residential rental properties for six months. Ordinance No. 151,415 expires on April 30, 1979.

This ordinance has successfully reduced the rate of rent increases in the City, along with the concomitant hardships and displacements. However, a housing shortage still exists within the City of Los Angeles and total deregulation of rents at this time would immediately lead to widespread exorbitant rent increases, and

recurrence of the crisis, problems and hardships which existed prior to the adoption of the moratorium measure.

Therefore, it is necessary and reasonable to regulate rents so as to safeguard tenants from excessive rent increases, while at the same time providing landlords with just and reasonable returns from their rental units. In order to assure compliance with the provisions of this chapter violations of any of the provisions of this chapter may be raised as affirmative defenses in unlawful detainer proceedings. **(Amended by Ord. No. 166,130, Eff. 9/16/90.)**